82-1175

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

NORBERT R. BERG, individually, and on behalf of all other persons similarly situated,

Appellant,

v.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does Wisconsin's statutory licensing scheme for the hunting of deer and bear deny non-resident landowners their constitutional rights guaranteed by the Privileges and Immunities Clause of Article IV, §2 of the Constitution?

2. Does Wisconsin's statutory licensing scheme for the hunting of deer and bear deny non-resident landowners their constitutional rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

LIST OF PARTIES IN PROCEEDING BELOW

Norbert R. Berg, individually, and on behalf of all other persons similarly situated, was the Plaintiff-Appellant in the proceeding below. The State of Wisconsin, its Department of Natural Resources, and Carroll D. Besadny, the Department's Secretary, in his official capacity, were the Defendants-Respondents in the proceeding below.

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STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

Appellant, Norbert R. Berg, individually, and on behalf of all others similarly situated, appeals from the final judgment of the Supreme Court of Wisconsin, dated October 11, 1982.

OPINIONS BELOW

The opinions of the Supreme Court of Wisconsin, the Wisconsin Court of Appeals and the Circuit of Dane County have not been reported. They are reprinted in the Appendix, p. A-1, infra.

JURISDICTION

The final judgment of the Supreme Court of Wisconsin was entered on October 11, 1982. The judgment denied Appellant Norbert R. Berg's request for a review of an adverse decision of the Wisconsin Court of Appeals, dated August 20, 1982.

A Notice of Appeal to this Court was duly filed with the Clerk of the Supreme Court of Wisconsin on January 6, 1983. A copy of the Notice of Appeal was also filed with the Circuit Court of Dane County, the court possessing the record, on January 6, 1983.

This Appeal is being docketed in this Court within 90 days from the Supreme Court of Wisconsin's decision. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article IV, § 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Fourteenth Amendment, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes:

§ 29.01(8):

"Resident" means a person who has maintained his or her place of permanent abode in this state for a period of 30 days immediately preceding his or her application for license. Domiciliary intent is required to establish that a person is maintaining his or her place of permanent abode in this state. Mere ownership of property is not sufficient to establish domiciliary intent. Evidence of domiciliary intent includes, without limitation, the location where the person votes, pays personal income taxes or obtains a driver's license.

§ 29.12(1):

Nonresident hunting licenses shall be general, deer, bear, small game or archer hunting licenses, and shall be issued subject to § 29.09 by the department or by a county clerk to persons applying for these licenses who are not residents. The fee for each general license is $125, for each nonresident deer license is $80, for each nonresident bear license is $100, for each nonresident small game license is $60, for each nonresident archer hunting license is $60 and for each nonresident 5-day small game license is $25.

§ 29.24:

The owner or occupant of any land, and any member of his or her family may hunt foxes, raccoons, woodchucks, rabbits and squirrels on the land without a license at any time . . .

§ 29.105(1):

A resident deer hunting license shall be issued subject to § 29.09 by the department or by a county clerk, on a

blank furnished by the department, to any resident applying for this license. The fee for this license is $10.50. A resident deer hunting license authorizes the hunting of deer with firearms only.

§ 29.109(1):

A resident bear hunting license shall be issued subject to § 29.09 by the department or by a county clerk, on a blank furnished by the department, to any resident applying for this license. The fee for this license is $10.50. A resident bear license authorizes the hunting of bear with firearms only. Except as provided in sub. (2), a resident bear license may not be issued on or after the opening date of the bear season.

§ 29.109(2):

Bear hunting licenses shall be issued either before or after the opening of the season at resident fees to any member of the U.S. armed forces . . . and: (a) Is stationed in Wisconsin; or (b) Is a Wisconsin resident on furlough or leave.

§ 29.09(12)(a):

Fishing licenses, small game hunting licenses and deer hunting licenses shall be issued at resident fees by the department and by the county clerks to any student or to any member of the armed forces of the United States applying therefor, who exhibits proof that he is in active service with such armed forces and that he is stationed in Wisconsin or that he is a registered full-time undergraduate student in residence of a college or university, public or private, located in this state and offering a bachelor's degree or is a citizen of a foreign country temporarily residing in this state while attending a Wis-

consin high school or an agricultural short course at the University of Wisconsin.

STATEMENT OF THE CASE

Appellant Norbert R. Berg (hereinafter "Berg"), a Minnesota resident, owns forty acres of land in Barron County, Wisconsin on which he maintains an all-season dwelling. For many years he has used substantial portions of his property as a wildlife preserve. As a landowner, Berg is subject to the general taxing authority of Wisconsin.[1]

Berg wishes to hunt deer and bear on his own land and on other parcels of land, public and private, in Wisconsin. The Wisconsin game laws, Wis. Stat. § 29 et seq., require him to pay approximately seven to nine times as much for a license to hunt deer or bear as resident landowners must pay. Although Berg does not reside in Wisconsin, he contends that he should be treated in the same manner as other Wisconsin landowners.

On November 14, 1980 Berg, on behalf of himself and all others similarly situated, sued the State of Wisconsin, its Department of Natural Resources and the Secretary of the Department, Carroll D. Besadny for declaratory and injunctive relief. He alleged that the nonresident license fees to hunt deer and bear: (1) bore no reasonable relationship to the care, preservation or management of wild life in Wisconsin; (2) arbitrarily discriminated against nonresident landowners; (3) violated the Privileges and Immunities Clause of Article IV, § 2 of the Constitution; and (4) violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

[1] Specifically, Berg pays virtually all Wisconsin taxes, including property tax. He does not pay state income taxes.

The defendants filed a Notice of Motion and Motion to Dismiss on November 25, 1980. Arguing that *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), controlled, the defendants asserted that differentiation in hunting license fees for residents and nonresidents was permissible. The plaintiffs replied on March 9, 1981, contending that the Wisconsin regulatory scheme contravened both the Privileges and Immunities Clause of Article IV of the Constitution and the Equal Protection Clause of the Fourteenth Amendment.

The Court granted Defendants' Motion to Dismiss on October 26, 1981, found that the challenged Wisconsin regulatory scheme did not violate the Constitution. Among other things, the Court ruled that (1) Berg was a non-resident landowner in Wisconsin; (2) big game hunting by non-resident landowners is not a fundamental right; and (3) Wisconsin's regulatory scheme is reasonably related to the State's conservation interest.

The Plaintiff appealed to the Wisconsin Court of Appeals on December 4, 1981. The Court affirmed the lower court's decision on August 20, 1982. Specifically, it held that the regulatory scheme did not violate either the Privileges and Immunities Clause or the Equal Protection Clause of the Constitution. Subsequently, the plaintiffs appealed to the Wisconsin Supreme Court. That Court affirmed the decision of the Court of Appeals decision on October 11, 1982.

THE QUESTIONS ARE SUBSTANTIAL

1. The Wisconsin Supreme Court's Decision Permitting The State To Require Non-Resident Landowners To Pay Exponentially More For Licenses To Hunt Deer and Bear Than Residents Contravenes This Court's Prior Rulings Interpreting The Privileges and Immunities Clause of Article IV, § 2 of the Constitution.

The question whether the Privileges and Immunities Clause of Article IV, § 2 of the Constitution prohibits states from charging non-resident landowners seven to nine times as much for a hunting license than residents is substantial. This Court has never before confronted this issue.

This Court has recognized that the right of a United States citizen to use and enjoy his property is fundamental. *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). Legal residence in a state other than the one in which the property is owned does not diminish this right. On the contrary, the Constitution requires that states accord non-residents the same fundamental rights that they grant to their own citizens. *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

The Privileges and Immunities Clause of Article IV, § 2 of the Constitution protects a non-resident's fundamental rights. It insures ". . . to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). For instance, the clause protects a non-resident who enters another state to work, *Hicklin v. Orbeck, supra*, to hunt commercial game, *Toomer, supra*, to procure medical services, *Doe v. Bolton*, 410 U.S. 179 (1973) or to take and hold real estate, *Ward v. Maryland*, 79 U.S. 163 (1871).

Hicklin, supra, set the proper standard of review under the Privileges and Immunities Clause. All legislation affecting a non-resident's ability to exercise a fundamental right on the same basis as a resident must pass a two-part test. First, the state must prove ". . . that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Hicklin, supra*, at 525-526. Second, the Court must find a "substantial relationship" between the evil and the discrimination practiced against the non-residents. *Id.* at 527.

Wisconsin has not demonstrated that non-resident landowners are the "peculiar source" of any evil addressed by its licensing scheme.[2] It has argued that it charges non-residents more for hunting licenses in order to protect its big game population. In the same breath, however, Wisconsin admits that there are currently no limits on the sales of licenses to either resident or non-resident hunters. Defendants' Brief in Opposition to Plaintiffs' Reply Brief in Opposition to Defendants' Motion To Dismiss, Circuit Court of Dane County, at 12. In fact, in 1980 it awarded almost forty times as many hunting licenses to residents as it did to non-residents. Defendants-Respondents Brief, Appeal to the Court of Appeals of Wisconsin, at 16. Certainly, if Wisconsin's goal is to preserve its big game population it would not sell hunting licenses to anybody who is of requisite age and who is willing to pay.

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[2] The Wisconsin licensing system concerning hunting, and as it affects Berg, may be described as follows. First, as an "owner or occupant" of land in Wisconsin, he may hunt on his own land without any license foxes, raccoons, rabbits and squirrels. Wis. Stat. § 29.24. He may not, however, hunt deer or bear anywhere in the State without obtaining a non-resident license and paying between seven and nine times the fee a resident must pay to obtain the same license. Wis. Stat. §§ 29.12(1), 29.105(1), 29.109(1). The statutory definition of resident for hunting license purposes precludes him from claiming residency. Wis. Stat. 29.01(8).

Thus, Wisconsin cannot argue that non-resident landowners unreasonably deplete the big game population or make the conservation task any more difficult.

Wisconsin's second justification for the fee differential is a cost argument. Berg does not dispute that Wisconsin maintains a segregated fund devoted to maintaining fish, game and wildlife programs under the aegis of the Wisconsin Department of Natural Resources. However, Berg's taxes pay for precisely those services which make hunting possible for residents and non-residents alike, *e.g.*, county roads, fire protection, assistance by sheriff's departments to enforce game laws, etc. Thus, the rationale advanced by the State does not withstand scrutiny.[8]

Even if non-resident landowners were the peculiar source of evil addressed by the licensing and conservation scheme, Wisconsin has not chosen a cure that bears a "substantial relationship" to the malady. Indeed, the cure discourages the preservation of its big game. Wisconsin now sells licenses to hunt deer and bear to virtually all applicants. There are no license limits. It encourages hunting by offering to its residents, foreign students and members of the armed forces the right to hunt at reduced rates. Certainly, this cannot be deemed conservation.

Finally, Berg contends that *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), does not control the instant case. The prevailing argument in *Baldwin* did not address the interests of non-resident landowners. It ruled

[8] The ultimate irony in this case is that non-resident landowners are one of the few groups of non-residents actually forced to pay the higher licensing fees. Wisconsin permits both foreign students temporarily residing in Wisconsin and non-resident members of the armed forces to hunt at resident rates. Wis. Stat. §§ 29.109(2), 29.09(12)(a).

only that states may constitutionally charge transient nonresidents who are not subject to the general taxing authority of the state higher hunting license fees than residents. Berg, a landowner, is subject to the general taxing authority of Wisconsin. Similarly, Montana's conservation scheme was more strict than Wisconsin's. Montana imposed a restriction on the number of licenses sold. Given the small population of elk in Montana, a need to limit the number of hunters depleting their numbers existed. Wisconsin cannot demonstrate this need since it welcomes ever-increasing numbers of big game hunters.

For the above reasons, this Court must conclude that Wisconsin unjustifiably discriminated against non-resident landowners who wish to hunt deer and bear on either their own land or elsewhere in Wisconsin. These individuals have a fundamental right to use their land in the same manner as other Wisconsin landowners. Similarly, their yearly tax payments qualify them for the right to hunt throughout the State at the rates charged residents.

This case also presents the Court with the opportunity to define more precisely the parameters of the protections afforded by the Privileges and Immunities Clause. The Supreme Court of Wisconsin committed itself to the view that unequal treatment of residents and nonresident landowners was constitutionally permissible so long as essential activities or rights were not affected. This approach has recently come under attack. *See, e.g.*, Jonathan Varat, *State "Citizenship" and Interstate Equality*, 48 U. of Chi. L. Rev. 487 (1981).

The diverging views stem from the vexing problem of defining "fundamentality." In *Baldwin, supra*, the Court declined to explain what generally distinguishes fundamental privileges. Instead, it ruled that, whatever the dividing line,

recreational elk-hunting by transients was not fundamental. Although Justice Blackmun did suggest that he had in mind the "modern . . . sense" of fundamentality applied in *Corfield v. Coryell, supra,* no precise elucidation of this "modern sense" now exists. *Baldwin, supra* at 386-387.

The lack of a precise definition of fundamental rights narrows the ambit of the Privileges and Immunities Clause. If fundamentality under Article IV is similar to the fundamental right analysis under equal protection, the Privileges and Immunities Clause would be rendered superfluous. Even if it is deemed different, what is the touchstone? *Varat, supra* at 512. Indeed, is it even necessary that a right be fundamental to merit protection by the Privileges and Immunities Clause? *Baldwin* left all of these questions unanswered.

Hicklin, supra, also called into question the continued vitality of the fundamental rights analysis in *Baldwin.* In *Baldwin,* Justice Brennan had criticized the majority's inquiry into whether elk-hunting was a fundamental right, and asserted that ". . . our primary concern is the State's justification for its discrimination." *Baldwin, supra,* 436 U.S. at 402 (Brennan, J., dissenting). Justice Brennan, writing for a unanimous court in *Hicklin* used, for the most part, the very analysis he advocated in *Baldwin.* This may indeed signal the abandonment of the fundamental rights analysis. For discussions of this point by lower courts, *See, e.g., Piper v. Supreme Court of New Hampshire,* 539 F. Supp. 1064 (D.N.H. 1982) and *Hawaii Boating Association v. Water Transportation Facilities Division, Department of Transportation, State of Hawaii,* 651 F. 2d 661 (9th Cir. 1981).

In summary, this case provides the opportunity for the Court to clarify the contours of the Privileges and Immunities Clause of Article IV, § 2 of the Constitution. The effort is necessary given the current confusion surrounding it.

2. The Wisconsin Supreme Court's Decision Permitting The State To Require Non-Resident Landowners To Pay Exponentially More For Licenses To Hunt Deer And Bear Than Residents Violates This Court's Prior Ruling Interpreting The Equal Protection Clause Of The Fourteenth Amendment To The Constitution.

This case presents for the first time before this Court the question of whether the Equal Protection Clause of the Fourteenth Amendment prohibits a state from differentiating between the rights afforded to non-resident landowners and residents. It is a substantial question worthy of review by this Court.

Berg contends that the Wisconsin regulatory scheme denies him the use of his own property to hunt big game unless he pays seven to nine times the fees residents pay for the same privilege whether or not they own any land. When a state differentiates between the rights of individuals, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose. Some particularly invidious distinctions require a more rigorous scrutiny. *Zobel v. Williams*, —— U.S. ——, 72 L.Ed. 2d 672 (1982). In the instant case, the Wisconsin courts, employing only the rationality standard, upheld the constitutionality of its regulatory scheme. That decision was erroneous as a matter of law and must be reversed.[4]

The following facts bring this case properly within the ambit of equal protection: Berg, a Minnesota resident and

[4] Since the Wisconsin statutory scheme does not pass even the rationality standard, the higher level of scrutiny, as a matter of law, cannot be satisfied.

an owner of Wisconsin property, desires to hunt big game on his land and throughout several northern counties of the State. Under the current regulatory scheme, he may do so only if he purchases a non-resident hunting license which costs him seven to nine times more than it costs other Wisconsin residents. The discrimination is based solely on his legal residence being maintained in a neighboring state. He contends that this regulatory scheme violates his right to equal protection.

The regulatory structure bears no rational relation to Wisconsin's legitimate interest in conserving its wildlife. Wisconsin does not limit at all the number of persons who may hunt big game. It is not, therefore, engaged in "conservation." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977). On the contrary, Wisconsin is selling access to its big game to whomever can pay the fee.

Similarly, Wisconsin cannot logically argue that it may charge Berg more for a hunting license because, as a non-resident, he does not support the cost of running the State's big game management program. Berg is unquestionably subject to the general taxing authority of Wisconsin. He pays taxes which not only support local schools, but which underwrite a variety of ancillary services which make hunting possible in Wisconsin. The taxes help Barron County, for example, pay for roads, fire suppression and assistance by the sheriff's department to enforce the game laws.[5]

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[5] The paucity of Wisconsin's argument is further demonstrated by its willingness to permit foreign students and non-resident armed forces personnel to hunt at reduced rates. No member of either group qualifies as a resident under the applicable Wisconsin statute. Yet, both groups are singled out by the State for preferred treatment. In essence, the State has waived the residency qualifications as they apply to these groups. Berg asks for similar treatment.

Lower courts have ruled that states may not charge non-resident landowners higher license fees than residents to hunt on their own property. In *Pavel v. Pattison*, 24 F. Supp. 915 (D.C. La. 1938), the court invalidated a Louisiana statute which prohibited non-resident landowners who had not resided in the state for at least one year from trapping animals on their own property. The court opined that if a state could deny trapping privileges to those who had not resided in the state for at least one year, it could also make the term ten or even twenty years. It easily pierced the state's argument that non-residents did not pay taxes and did not contribute to the enforcement of the state's game laws, arguing that the non-resident's land was still potentially subject to taxes like anyone else's land. The court concluded that the statute violated the Equal Protection Clause in denying the landowner the right to use his property on the same footing with other landowners residing in the state.[6]

Wisconsin arbitrarily discriminates between non-resident landowners and residents. In addition, it discriminates without justification between certain classes of non-residents, i.e. between non-resident landowners like Berg and non-landowning non-residents like alien students and armed forces personnel. There is no justification for this disparity. Its regulatory scheme is an arbitrary and irrational denial of equal protection of the laws which must be overturned.

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[6] Shortly after this decision, the Louisiana Legislature amended the statute to permit non-residents to obtain trapping licenses on the payment of a $200 fee and the posting of a $300 deposit. Residents only had to pay $2 and were not required to leave a deposit. The court held, in *Pavel v. Richard*, 28 F. Supp. 992 (D.C. La. 1938), that this statute was also repugnant to the Equal Protection Clause.

CONCLUSION

For the above reasons, this Court should note probable jurisdiction of this appeal.

Respectfully Submitted,

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